



## Public Availability of Inoperative Agency Guidance Documents

### Committee on Regulation

#### Proposed Recommendation for Committee | ~~October 20~~ November 3, 2021

1 Agencies issue guidance documents to help explain their programs and policies,  
2 announce their interpretation of laws, and communicate other important information to regulated  
3 entities, regulatory beneficiaries, and the broader public.<sup>1</sup> The Administrative Conference has  
4 issued several recent recommendations regarding guidance documents.<sup>2</sup> Among them was  
5 Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, which encourages  
6 agencies to facilitate public access to guidance documents on their websites.

7 Over time, a given guidance document may no longer reflect an agency's position. An  
8 agency may rescind the document in whole or in part by announcing that it no longer reflects the  
9 agency's position. Even without being rescinded in whole or in part, a guidance document can be  
10 superseded in whole or in part by later statutory, regulatory, or judicial developments, or it can  
11 fall into disuse in whole or in part. The present Recommendation terms these documents  
12 "inoperative guidance documents."

13 Some inoperative guidance documents will be of interest to the public because they  
14 disclose how an agency's legal interpretations have changed<sup>3</sup> or how policies or programs have

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<sup>1</sup> This Recommendation defines "guidance document" as does Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, to mean "interpretive rules," "general statements of policy," see 5 U.S.C. § 553 (d), and "other materials considered to be guidance documents under other, separate definitions adopted by government agencies." See Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931, 38931 (Aug. 8, 2019).

<sup>2</sup> See, e.g., Recommendation 2019-3, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35992 (June 25, 2014).

<sup>3</sup> See Blake Emerson & Ronald Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis* (May 28, 2019) (report to the Admin. Conf. of the U.S.).



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15 changed over time.<sup>4</sup> But if these documents are not posted on an agency’s website, they will be  
16 either inaccessible (except through a Freedom of Information Act (FOIA) request), in the case of  
17 documents not published in the *Federal Register*, or not as accessible as they should be, in the  
18 case of documents that appeared in the *Federal Register*.<sup>5</sup>

19 Three statutes require agencies to make some inoperative guidance documents publicly  
20 available. The Federal Records Act requires agencies to post on their websites materials that are  
21 of “general interest or use to the public.”<sup>6</sup> FOIA requires agencies to publish notices in the  
22 *Federal Register* when they have rescinded or partially rescinded guidance documents that are  
23 addressed to the public generally rather than to specific individuals or organizations.<sup>7</sup> The E-  
24 Government Act requires agencies to publish these rescission and partial rescission notices on  
25 their websites.<sup>8</sup> Many agencies have also issued regulations pertaining to the public availability  
26 of their inoperative guidance documents.

27 The Office of Management and Budget’s 2007 *Final Bulletin for Agency Good Guidance*  
28 *Practices* imposes additional requirements on agencies relating to inoperative guidance  
29 documents. It directs all agencies other than independent regulatory agencies to post notices on  
30 their websites whenever they have rescinded or partially rescinded significant guidance  
31 documents and to keep those notices in place for a year.<sup>9</sup> It also states that such agencies should  
32 stamp or otherwise prominently identify as “superseded” those significant guidance documents  
33 that have become inoperative but which remain available for historical purposes.

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<sup>4</sup> See Nicholas R. Parrillo, *Agency Guidance Through Policy Statements: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.).

<sup>5</sup> See Recommendation 2019-3, *supra* note 1.

<sup>6</sup> See 44 U.S.C. § 3102 (2).

<sup>7</sup> See 5 U.S.C. § 552 (a)(1); *Nat’l Org. of Veterans’ Advocs., Inc. v. Sec’y of Veterans Affairs*, 981 F.3d 1360, 1375 (Fed. Cir. 2020).

<sup>8</sup> See E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (codified at 44 U.S.C. § 3501 note).

<sup>9</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007).



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34 Recommendation 2019-3, though concerned primarily with operative guidance  
35 documents, makes several recommendations relating to the posting of inoperative guidance  
36 documents. In summary, it recommends that agencies (1) mark posted guidance documents to  
37 indicate whether they are current or were withdrawn or rescinded and (2) in the case of rescinded  
38 or withdrawn documents, note their rescission or withdrawal date and provide links to any  
39 successor document.

40 Recommendation 2019-3 reserved the question, however, of which inoperative guidance  
41 documents agencies should publish online. This Recommendation takes up that issue, building  
42 on the principles Recommendation 2019-3 set forth for operative documents by extending them,  
43 as appropriate, to inoperative guidance documents. Specifically, it advises agencies to develop  
44 written procedures for publishing inoperative guidance documents, devise effective strategies for  
45 labeling and organizing such documents on their websites, and deploy other means of  
46 disseminating information about such documents.<sup>10</sup>

47 This Recommendation, like Recommendation 2019-3, accounts for differences across  
48 agencies in terms of the number of guidance documents they issue, how they use guidance  
49 documents, and their resources and capacities for managing online access to these documents.  
50 Accordingly, this Recommendation does not advise agencies to post all of their inoperative  
51 guidance documents online.

52 This Recommendation is limited to guidance documents that become inoperative in the  
53 future. Agencies may, of course, choose to apply it retrospectively to existing inoperative  
54 guidance documents.

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<sup>10</sup> Several paragraphs of this Recommendation directly or indirectly apply the paragraphs of Recommendation 2019-3, *supra* note 1, to inoperative guidance documents. Compare Paragraph 1 of this Recommendation with Recommendation 2019-3, ¶ 1; Paragraph 3 with Recommendation 2019-3, ¶¶ 4, 7, and 9; Paragraph 4 with Recommendation 2019-3, ¶ 8; and Paragraph 6 with Recommendation 2019-3, ¶ 11.



RECOMMENDATION

**Deciding Which Types of Inoperative Guidance Documents to Make Publicly Available on Agencies' Websites**

55 1. Agencies Each agency should ~~determine which types~~ develop and publish on its website  
56 written procedures governing the public availability of inoperative guidance documents  
57 and should consider doing the following in its procedures:

58 a. Defining what it considers to be an "inoperative guidance document," with  
59 consideration of categories such as rescinded guidance documents, partially  
60 rescinded guidance documents, superseded guidance documents, partially  
61 superseded guidance documents, and guidance documents that have been  
62 rescinded, superseded, or have fallen into disuse (collectively "in whole or in part;

63 b. Specifying how it will notify the public when a guidance document has been  
64 rescinded, partially rescinded, superseded, partially superseded, or has fallen into  
65 disuse in whole or in part;

66 a-c. Identifying, as elaborated in Paragraph 2 below, which kinds of inoperative  
67 guidance documents") should be made publicly available on their websites.  
68 its website;

69 b.d. In determining which types of Specifying how long inoperative guidance  
70 documents are to make publicly available be retained on their websites, agencies  
71 should consider, among others, the following factors: its website;

72 e. Whether the Specifying whether some types of previously unpublished operative  
73 documents are to be posted on its website when they become inoperative and, if  
74 so, under what circumstances;

75 f. Providing for how inoperative guidance documents appear to be of interest are to  
76 the be organized on its website to facilitate searching and public access;

77 a. Identifying, as indicated by many unique page views or downloads of the  
78 documents (either while the documents were operative or while they were



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79 ~~inoperative but already made available) or by many unique inquiries about the~~  
80 ~~documents;~~

81 ~~g. Whether elaborated in Paragraph 3 below, what labels and explanations it will use~~  
82 ~~to communicate clearly the inoperative status of guidance documents; and~~

83 ~~h. Indicating whether any or all of the procedures should be applied retroactively.~~

**Determining Which Kinds of Inoperative Guidance Documents to Publish Online**

84 2. ~~In deciding which kinds of inoperative guidance documents to post on its website, an~~  
85 ~~agency should at least consider the following factors:~~

86 a. ~~Whether it previously posted the operative version of the inoperative guidance~~  
87 ~~document on its website;~~

88 b. ~~Whether its current policy for posting operative guidance documents, while would~~  
89 ~~call for posting such an inoperative guidance document if it were operative;~~

90 c. ~~Whether the inoperative guidance document generates—or, when it was~~  
91 ~~operative, generated—numerous unique inquiries from the public;~~

92 d. ~~Whether the inoperative guidance document generated reliance interests, as~~  
93 ~~indicated by frequent citations of the when it was operative versions of;~~

94 e.e. ~~Whether the inoperative guidance document is—or, when operative, was—the~~  
95 ~~subject of attention in the general media or specialized publications relevant to the~~  
96 ~~agency, or has been cited frequently in other agency documents in regulations,~~  
97 ~~such as permits, licenses, grants, loans, contracts, or briefs, or news sources, or~~  
98 ~~substantial public feedback; or;~~

99 f. ~~Whether the operative version of an inoperative guidance documents,~~  
100 ~~while document generated a high level of public participation when it was~~  
101 ~~originally being formulated; and~~

102 d.g. ~~Whether the inoperative guidance document, when it was operative, dealt with~~  
103 ~~issues of widespread significance or controversial matters, as indicated by~~  
104 ~~submission originally being formulated, had been submitted to the Office of~~

**Commented [TR1]:** Note for Committee: The intention here is not to suggest that an agency consider each of its inoperative guidance documents against these factors. Rather, the intention is to suggest that an agency consider these factors in deciding on the categories of inoperative guidance documents to publish online. We welcome the committee's input on whether the current wording reflects that intent.



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105 Information and Regulatory Affairs ~~of the operative versions of the guidance~~  
106 ~~documents or publication in the agencies' or published in the agency's~~ *Unified*  
107 *Agenda of the same.*

### **~~Establishing Written Procedures for Inoperative Guidance Documents~~**

- 108 ~~2. Agencies should develop and publish on their websites written procedures governing the~~  
109 ~~storage and display of those inoperative guidance documents the agencies have~~  
110 ~~determined should be made publicly available on their websites. These procedures should~~  
111 ~~either be part of their general procedures governing storage and display of their guidance~~  
112 ~~documents or can be stand-alone procedures. At a minimum, these procedures should:~~  
113 ~~a. Provide for how inoperative guidance documents are to be compiled and~~  
114 ~~organized on agencies' websites to make it easy for the public to find the~~  
115 ~~inoperative guidance documents in which they are interested; and~~  
116 ~~b. Specify the labels and explanations agencies will use to ensure the public can~~  
117 ~~readily understand the significance and effect of inoperative guidance documents.~~

### **~~Organizing and Labeling Inoperative Guidance Documents on Agencies'~~ ~~Websites Available Online~~**

- 118 ~~3. Agencies~~Each agency should organize ~~its~~ inoperative guidance documents on ~~their~~  
119 ~~websites~~its website to make it easy for ~~members of~~ the public to find ~~them~~. The agency  
120 ~~should consider one or more of the following approaches:~~  
121 ~~a. Assigning a unique guidance identification number to each~~ inoperative guidance  
122 ~~documents in which they are interested. Among~~document, if such a number had  
123 ~~not already been assigned when~~ the options agencies should consider, alone or in  
124 ~~tandem with one another, are:~~document was operative;  
125 ~~b. Creating a table that is indexed, tagged, or sortable, and is dedicated exclusively~~  
126 ~~to~~housingdisplaying entries for inoperative guidance documents, with links to  
127 such documents;



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- 128 c. Providing a search function that ~~uncover~~enables retrieval of inoperative guidance  
129 documents; and
- 130 d. Using a method, such as a pull-down menu, that allows the public to view  
131 inoperative guidance documents ~~at different points in time, with an indication on~~  
132 ~~all inoperative versions of the documents~~and see that they are inoperative.

133 ~~3.4. Agencies~~Each agency should label inoperative guidance documents on ~~their websites~~its  
134 website to ensure that the public can readily understand the ~~significance and~~  
135 ~~effect~~inoperative status of those guidance documents. ~~Among the~~The agency should  
136 consider adopting one or more of the following labeling methods ~~agencies should~~  
137 ~~consider, alone or in tandem with one another, are~~and using the selected method or  
138 methods consistently for all inoperative guidance documents:

- 139 a. Including a watermark that ~~reads~~displays “rescinded,” ~~“partially rescinded,”~~  
140 ~~“superseded,” “partially superseded,” “not in use,” or uses~~ similar terminology; ~~as~~  
141 appropriate across each page of ~~an~~ inoperative guidance ~~documents~~document;
- 142 b. Including words such as “rescinded,” “partially rescinded,” “superseded,”  
143 “partially superseded,” “not in use,” or similar terminology as appropriate within  
144 a table in which links to inoperative guidance documents appear;
- 145 c. Posting a redline version of a guidance document that has been partially  
146 rescinded, showing the exact revisions;
- 147 d. Including a prominent stamp at the top of ~~an~~ inoperative guidance  
148 ~~documents~~document noting that the ~~documents are rescinded~~document is  
149 inoperative and indicating the ~~date~~date it became inoperative;
- 150 e. Providing cross references, with links, from an inoperative guidance document to  
151 any successor versions of the guidance document, and vice versa; and
- 152 b. ~~Publishing a notice~~ of rescission;
- 153 e. f. ~~Publishing notices of or partial~~ rescission of a guidance document on agencies’  
154 websites~~the agency’s website~~ and providing links to such notice in the notices in  
155 inoperative guidance ~~documents; and~~document.



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156 ~~d. Including the word “rescinded,” or similar terminology, within a table in which~~  
157 ~~links to inoperative guidance documents appear.~~

**Using ~~Means Other Than Agencies’ Websites~~ Means to Notify the Public of the  
~~Rescission and Posting of Inoperative Guidance Documents~~**

158 5. Agencies ~~At a minimum, an agency should notify the public that a guidance document has~~  
159 ~~become inoperative in the same way that it notified the public that the operative version~~  
160 ~~of the guidance document was issued, or in the same way it would notify the public that~~  
161 ~~an operative version of the guidance document has been issued under the agency’s~~  
162 ~~current policies.~~

163 4.6. An agency ~~should consider using the following methods, alone or in conjunction with one~~  
164 ~~another, or more of the following methods~~ to notify the public when ~~they have rescinded a~~  
165 ~~guidance documents and document has become inoperative or~~ to notify the public that ~~the~~  
166 ~~inoperative guidance documents are~~ document is available on ~~their websites~~ its website:

- 167 a. Publishing such ~~notifications~~ notification in the *Federal Register*; even when not  
168 required to do so by law;
- 169 b. Sending such ~~notifications~~ notification over ~~listservs that consist of interested~~  
170 ~~members of the public~~ agency listserv or to a similar mailing list to which the  
171 public can subscribe;
- 172 c. Conveying such ~~notifications~~ notification during virtual meetings, in-person  
173 meetings, or webinars; involving the public; and
- 174 ~~d. Conveying such notifications~~ notification through a press releases; and  
175 ~~e. d. Using or developing subscription services to allow the public to subscribe to such~~  
176 ~~notifications.~~ release.